87-1311

Supreme Court, U.S.
FILED
JAN 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

MICHAEL ALAN LAU and
BRUCE TAYLOR,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FIRST CIRCUIT

ROBERT AUGUSTUS HARPER
131 North Gadsden Street
Post Office Box 10132
Tallahassee, FL 32302-0132
(904) 224-5900

Counsel for Petitioners

II. QUESTION PRESENTED

A. Whether the standard of proof predicate for the admission of similar fact evidence under Rule 404(b) Federal Rules of Evidence, is "clear and convincing" or some other standard, a question over which the circuits are divided.

III. LIST OF PARTIES

All parties to the cause of action are included in the caption.

IV. TABLE OF CONTENTS

		Page
II.	QUESTION PRESENTED	ii
III.	LIST OF PARTIES	ii
IV.	TABLE OF CONTENTS	iii
V.	TABLE OF AUTHORITIES	v
VI.	PRAYER FOR RELIEF	1
VII.	OPINION BELOW	2
VIII.	JURISDICTION	3
IX.	STATUTES INVOLVED	4
X.	STATEMENT OF THE CASE	4
XI.	REASONS FOR GRANTING THE WRIT	10
	Conflicts Among the Circuits	10
XII.	CONCLUSION	15

V. TABLE OF AUTHORITIES

	Page
CASES	
Bonner v. City of Prichard, Alabama, 661 F.2d 1206 (11th Cir. 1981) (en banc)	13
Stein v. Reynolds Securities, Inc. 667 F.2d 33 (11th Cir. 1982)	13
United States v. Baillcaux, 685 F.2d 1105 (9th Cir. 1980)	11
United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979)	13,14 15
United States v. Biswell, 700 F.2d 1310 (10th Cir. 1983)	12
United States v. Dothard, 666 F.2d 498, 502 (11th Cir. 1982)	10
United States v. Ebens, 800 F.2d 1422 (6th Cir. 1986)	12
United States v. Edwards, 696 F.2d 1277 (11th Cir.) (per curiam), cert. denied, 461 U.S. 909, 103 S.Ct. 1884, 76 L.Ed.2d 813 (1983)	13,14
United States v. Estabrook, 774 F.2d 284 (8th Cir. 1985)	11
United States v. Huddleston, 811 F.2d 974 (6th Cir.) (per curiam), (vacating 802 F.2d 874 (1986)), cert. granted, ____ U.S. ____, 108 S.Ct. 226, 97 L.Ed.2d ____ (1987)	11,12,14

	Page
CASES	
United States v. Ingraham, 832 F.2d 229 (1st Cir. 1987)	10,11
United States v. Lau, 828 F.2d 871 (1st Cir. 1987)	1,2,3,5 14,15
United States v. Leonard, 524 F.2d 1076 (2d Cir. 1975), cert. denied, 425 U.S. 958, 96 S.Ct. 1737, 48 L.Ed.2d 202 (1976)	12
United States v. Martin, 773 F.2d 579 (4th Cir. 1985)	13
United States v. Mascio, 774 F.2d 219 (7th Cir. 1985)	11
United States v. Nahoom, 791 F.2d 841 (11th Cir. 1986)	14
United States v. Taylor, 828 F.2d 871 (1st Cir. 1987)	1,2,3,5 14,15
STATUTES	
28 U.S.C. §1254(1)	3
28 U.S.C. §1291	3
OTHER AUTHORITIES	
Rule 104(b), Federal Rules of Evidence	12,13,15
Rule 404(b), Federal Rules of Evidence	ii,4, 10
Rule 901(a), Federal Rules of Evidence	10
Supreme Court Rule 20.1.	3

VI.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

==========

MICHAEL ALAN LAU and
BRUCE TAYLOR,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ Of Certiorari
To The United States Court of Appeals
For The First Circuit

The Petitioners, MICHAEL ALAN LAU and BRUCE TAYLOR, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on direct appeal, United States v. Lau/Taylor, 828 F.2d 871 (1st Cir. 1987).

VII. OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit on direct appeal is cited, United States v. Lau, 828 F.2d 871 (1st Cir. 1987) and United States v. Taylor, 828 F.2d 871 (1st Cir. 1987).

VIII. JURISDICTION

The case originated as a criminal prosecution in the United States District Court, District of Puerto Rico. Upon conviction, direct appeal of the final order, judgment and sentence, was timely prosecuted to the United States Court of Appeals, First Circuit, pursuant to 28 U.S.C. §1291. The oral argument panel affirmed with an opinion on 15 September 1987, United States v. Lau/Taylor, 828 F.2d 871 (1st Cir. 1987). Petition for rehearing and suggestion for en banc consideration were timely filed and later denied on 29 October 1987. Extention of time for filing the Petition for Writ of Certiorari was granted by the Supreme Court up to 27 January 1988. Jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254(1) and Supreme Court Rule 20.1.

IX. STATUTES INVOLVED

Rule 404(b), Federal Rules of Evidence

Character Evidence Not Admissible to Prove Conduct: Exceptions; Other Crimes

(b) Other crimes, wrongs, or acts

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

X. STATEMENT OF THE CASE

A.

Petitioners were charged jointly in a superseding indictment dated 28 August 1985 with three offenses, conspiracy to import and possess cocaine with intent to distribute, importation of cocaine, and possession of cocaine with intent to distribute by the grand jury sitting in the District of Puerto Rico. (R-22). The case was tried before a jury in San Juan, Puerto Rico, on 09 December 1985 and concluded on 17 December 1985

with guilty verdicts as to each defendant on all counts. Petitioner LAU was sentenced on 03 March 1986 to a term of 35 years and a committed fine of sixty thousand dollars ($60,000.00). (R-104). Petitioner TAYLOR was sentenced to a total term of incarceration of 25 years and a committed fine of forty thousand dollars ($40,000.00). (R-117).

Notice of appeal was filed, and appeal was taken to the United States Court of Appeals, First Circuit, where the case was heard on oral argument on 01 June 1987. The judgment of the District Court was affirmed by a written opinion dated 15 September 1987. United States of America v. Lau/Taylor, 828 F.2d 871 (1st Cir. 1987). Rehearing and en banc consideration were denied on 29 October 1987. Associate Justice of the Supreme Court of the United States Honorable Byron R. White on 29 December 1987 extended to and included 27 January 1988 for the filing of this petition upon an application for extention of time within which to file petition for writ of certiorari.

B.

On 09 August 1985 between 1:00 and 1:30 p.m. Gus Maestrales landed an air-ambulance jet at San Juan, Puerto Rico, where he cleared customs. He then met Petitioner MICHAEL ALAN LAU, a helicopter pilot, who approached him and asked about passengers. Mr. Maestrales informed Mr. LAU that the passengers were on the ramp and then identified co-defendant Bruce TAYLOR as one of the passengers. (TR-193). The passengers were accompanied by another man sitting in a wheel-chair and a fourth older gentleman named Marvin.

Mr. Maestrales and his co-pilot, Mr. Paul Roy Levit, discussed that the suitcases were very heavy. Customs officers at the airport were then notified (TR-197, 203) and when one of the bags was opened, cocaine was discovered.

While some fifteen witnesses were called in the case in chief for the government, the principal testimony was that of Thomas William Aiello, who testified about a prior "bad act." He

testified that he had met appellant TAYLOR in January of 1983 in Broxton, Georgia, where he had gone to check an air-strip to see whether it was suitable for landing an airplane. (TR-445). Mr. Aiello also testified that he had met Mr. LAU on the previous date in August of 1982 when he had handed Mr. LAU a check and had a couple of drinks. Mr. Aiello told the jury over the timely and specific objection of defense counsel that the incident had not been proven by the predicate "clear and convincing" evidence standard (TR-425), that an airplane piloted by Mr. LAU had landed in Broxton, Georgia. The plane had gotten stuck in the mud, and Mr. Aiello, and allegedly Mr. TAYLOR and Mr. LAU had tried to get the plane unstuck for about an hour and a half. When they could not get the plane out of the mud they all drove in two trucks to different locations where they later met at a restaurant. Mr. LAU and another individual, Douglas Brezinski, were allegedly discussing payment. Mr. Aiello stayed with Mr. LAU for another hour and a half to two hours. The

physical descriptions given initially by Mr. Aiello were considerably different from the persons of the defendants. (TR-515, 580, 581). Mr. Aiello initially failed to identify Mr. LAU from photographs shown by the DEA. (TR-479). While Mr. Aiello testified that the plane landed in the darkness hours got stuck in the mud and remained there (TR-503, 507), no independent evidence was introduced of any plane being found. The testimony of Mr. Aiello was inconsistent and contradictory about description, places, people, and even the timing of the Broxton, Georgia, event (TR-514, 518). Mr. Aiello's testimony was severely compromised by his admission of lying regarding a document (TR-519) and that he was testifying only out of the goodness of his heart. (TR-520).

The Government was then successfully able to persuade the trial court and jury that the suit-cases of cocaine were flown into San Juan in the LAU helicopter and that Mr. LAU and his business partner in the charter service, Mr. TAYLOR, were

responsible for the transporting of the cocaine and bringing it to San Juan where it was to be further delivered to the United States on the jet. All three persons about to board the jet, a man in a wheelchair, an older man (Jacobson) from the helicopter, and Mr. TAYLOR, denied ownership and knowledge of the six suitcases. (TR-215).

In this context the Appellants argued to the United States Court of Appeals, First Circuit, that Mr. Aiello was testifying about an uncharged incident of cocaine importation which allegedly occurred some two years and eight months before the charged offenses. Mr. Aiello was not involved nor did he participate in the offenses which were charged in the indictment.

Specifically Appellants argued at trial (TR 425-437; 489-533) and on appeal that "the trial court failed to make an initial determination and finding that Rule 404(b) prior act evidence had been proven by clear and convincing evidence prior to allowing it to be presented to the jury."

(Initial Brief of Appellant [LAU], page 10.) The issue is squarely before the Court.

XI. REASONS FOR GRANTING THE WRIT

Conflicts Among the Circuits

The authentication standard of Fed. R. Evid. 901(a)[1] requires the prosecution to establish that the defendant committed an offense before that offense can be admitted as evidence of "other crimes, wrongs or acts" under Rule 404(b). See United States v. Dothard, 666 F.2d 498, 502 (11th Cir. 1982). While it is clear that the government need not prove the defendant guilty of the uncharged "bad act" beyond a reasonable doubt, it is much less clear precisely what burden of proof must be shouldered. "The circuits are in considerable disarray." United States v. Ingraham, 832

---

[1] Fed. R. Evid. 901(a) reads: The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

F.2d 229, 234 (1st Cir. 1987). The Supreme Court has now granted certiorari in a case likely to resolve the dilemma. United States v. Huddleston, 811 F.2d 974 (6th Cir.) (per curiam), cert. granted. ____ U.S. ____, 108 S.Ct. 226, 97 L.Ed.2d ____ (1987). But the Supreme Court has not previously spoken on the point.

Cases in at least four circuits require the trial judge to make a preliminary determination that there is "clear and convincing" evidence connecting the defendant to the "bad act" as a condition precedent to admissibility of the evidence. United States v. Estabrook, 774 F.2d 284, 288 (8th Cir. 1985) (government must "prove by clear and convincing evidence the [defendant] committed the extrinsic acts"); United States v. Mascio, 774 F.2d 219, 223 (7th Cir. 1985) ("when evidence of prior crimes is introduced, it must to clear and convincing"); United States v. Baillcaux, 685 F.2d 1105, 1109-10 (9th Cir. 1980) (similar).

Other circuits have adopted a less rigid stance. The Second Circuit has allowed "bad act" evidence when proven by a fair preponderance, specifically rejecting any stricter criterion. United States v. Leonard, 524 F.2d 1076, 1090-91 (2d Cir. 1975), cert. denied, 425 U.S. 958, 96 S.Ct. 1737, 48 L.Ed.2d 202 (1976). The Sixth Circuit agrees with this approach. United States v. Huddleston, 811 F.2d 975-77 (vacating 802 F.2d 874 (1986)); United States v. Ebens, 800 F.2d 1422, 1432 (6th Cir. 1986). The Tenth Circuit has held that "[t]here must be a clear and logical connection between the alleged earlier offense or misconduct and the case being tried." United States v. Biswell, 700 F.2d 1310, 1317-18 (10th Cir. 1983).

Three other circuits have refused to single out such evidence for special treatment, choosing simply to follow the usual convention of Fed. R.

Evid. 104(b).[2] The seminal cause for this proposition is United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc),[3] cert denied, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979). Beechum reversed earlier Fifth Circuit precedent which had applied the "clear and convincing" standard to extrinsic offense evidence. Id. at 910, n. 12. Beechum has been followed in at least two other circuits. See, e.g., United States v. Martin, 773 F.2d 579, 582 (4th Cir. 1985); United States v. Edwards, 696 F.2d 1277, 1280 (11th Cir.)[4]

---

[2]Fed. R. Evid. 104(b) reads: When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

[3]The Eleventh Circuit is bound by decisions of the former Fifth Circuit rendered prior to 01 October 1981, Bonner v. City of Prichard, Alabama, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), and by decisions of Unit B of the former Fifth Circuit rendered after that date. Stein v. Reynolds Securities, Inc., 667 F.2d 33, 34 (11th Cir. 1982).

[4]See fn. #3, supra.

(per curiam), cert. denied, 461 U.S. 909, 103 S.Ct. 1884, 76 L.Ed.2d 813 (1983). "The resultant standard is apparently no more rigorous--and perhaps more lenient--than the preponderance rule." United States v. Ingraham, supra, 832 F.2d at 235. See also United States v. Nahoom, 791 F.2d 841, 845 (11th Cir. 1986). The standards may in fact be functionally equivalent. In Huddleston, for example, a Sixth Circuit panel originally advocated the "clear and convincing" test, see 802 F.2d at 877, but changed its position on rehearing to adopt the preponderance test. 811 F.2d at 977. The panel indicated that it viewed Beechum as fully consistent with the Second Circuit precedent and with the preponderance standard. Id. at 976-77.

The First Circuit from whence Lau/Taylor originated has not chosen among these approaches,

> we note that our recent opinion in Lau[5] eschews "a seperate mechanical evidentiary test" for "bad act" evidence, 828 F.2d at 876, declines to adopt the "clear and convincing" standard, id., and relies on a

---

[5]The Petitioner before the Court.

> "sufficient evidence" analysis, id. at 876, distinctly reminiscent of Rule 104(b) and of Beechum and its progeny.

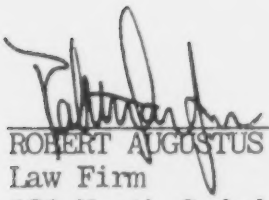
United States v. Ingraham, supra, 832 F.2d at 235.

With the result foreshadowed, ... by Lau, the First Circuit joined with the Fourth, Fifth and Eleventh Circuits on this point. United States v. Ingraham, supra, 832 F.2d at 235.

XII. CONCLUSION

With confidence it may be said that the issue would have been decided differently in another circuit. Had the issue been decided differently, the very outcome of the case would have been decided differently. The certainty of the criminal justice system decries such a result. The disproportionality can be resolved by the Supreme Court granting the writ and addressing the merits of the Petitioners' argument which relief is requested.

Respectfully submitted,



ROBERT AUGUSTUS HARPER
Law Firm
131 North Gadsden Street
Post Office Box 10132
Tallahassee, FL 32302-0132
(904) 224-5900

Counsel for Petitioners

RAHpp2

87-1811

Supreme Court, U.S.
FILED
JAN 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

MICHAEL ALAN LAU and
BRUCE TAYLOR,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FIRST CIRCUIT

ROBERT AUGUSTUS HARPER
131 North Gadsden Street
Post Office Box 10132
Tallahassee, FL 32302-0132
(904) 224-5900

Counsel for Petitioners

TABLE OF CONTENTS

Description		Page
I.	Portions of the Record Necessary to Show Proper and Timely Raising of Federal Questions	1
II.	Opinions of the Lower Court	5
	A. United States Court of Appeals for the First Circuit - Opinion 09-15-87	5
	B. United States Court of Appeals for the First Circuit - Order on Rehearing 10-29-87	27
	C. United States Court of Appeals for the First Circuit - Judgments/Mandates 11-09-87	29
III.	Judgments Sought to be Reviewed	37
	A. United States District Court for the District of Puerto Rico (Lau)	37
	B. United States District Court for the District of Puerto Rico (Taylor)	40

I. RECORD SHOWING PROPER AND TIMELY RAISING OF FEDERAL QUESTIONS:

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA	*	
vs	*	Criminal Case
MICHAEL ALAN LAU and	*	No. 85-321 (PG)
BRUCE TAYLOR	*	

FIFTH DAY OF JURY TRIAL

The above-captioned case came to be heard before the HONORABLE JUAN M. PEREZ-GIMENEZ, United States District Court Judge, sitting at San Juan, Puerto Rico, on December 16, 1985 at 9:00 a.m.

FERNANDO ALTAMIRANO, Official Court Reporter
P. O. Box 383, San Juan, P.R. 00902
722-2003, 722-1553

P R O C E E D I N G S

THE COURT: Are the parties ready?

MR. BAZAN: The government is ready, Your Honor.

MR. CAMPER: We are ready.
[Counsel for Lau]

MR. TAYLOR: We are ready, Your Honor.
[Counsel for Taylor]

THE COURT: Bring the jury in.

MR. BAZAN: Your Honor, before the jury is brought in I want to inform that the government intends to present evidence of prior similar acts.

If counsel for defendants have any objection to it, or any objection at all, I think it should be discussed right now before the jury comes in.

MR. TAYLOR: It is our position that at this point in time it certainly is questionable as to whether or not 404(b) will come in, in light of the evidence that is being presented today, and I think the appropriate procedure would be a proffer, either through the witness, what evidence he's expected to introduce, so that this Court can

make a determination of whether it is proper of anything in this particular case.

And of course, whether it would be prejudicial under the normal standards.

I think if the Court, from having reviewed the statements of the witnesses I would suggest most respectfully that Mr. Bazan have the burden of going forth and showing by clear and convincing evidence that supposedly an offense

426

occurred and that either or both of the defendants admitted that offense and if he cannot get past that standard we don't even get to the second issue, whether it is proper or prejudicial.

And, of course, if it is presented to the jury and the Court does not allow it after hearing it, well, that is -- I am suggesting that because of the nature of the allegations a curative instruction will be totally insufficient and too late, and we possibly will find ourselves in a mistrial posture.

So therefore, I would request that a proffer be made to the Court outside the presence of the jury. I think that would be the most safe course.

THE COURT: Mr. Camper?

MR. CAMPER: Same motion, Your Honor.

II. OPINIONS OF THE LOWER COURT:

A.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 86-1255 UNITED STATES OF AMERICA,
No. 86-2008

Appellee,

v.

MICHAEL ALAN LAU,

Defendant, Appellant.

No. 86-1256 UNITED STATES OF AMERICA,
No. 86-2002

Appellee,

v.

BRUCE TAYLOR,

Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

Hon. Juan M. Perez-Gimenez

U. S. District Judge

Before

Breyer and Selya, Circuit Judges,

and Re,* Judge.

William L. Camper for appellant Michael Alan Lau.

Clyde M. Taylor, Jr. for appellant Bruce Taylor.

Antonio R. Bazan, Assistant United States Attorney, with whom Daniel F. Lopez Romo, United States Attorney, was on brief for appellee.

September 15, 1987

---

*Chief Judge of the United States Court of International Trade, sitting by designation.

BREYER, Circuit Judge. The appellants, Michael Lau and Bruce Taylor, appeal their convictions for importing and possessing cocaine and for conspiring to do so. 21 U.S.C. §§ 841(a)(1), 846, 942(a). They claim that there was insufficient evidence for conviction; they make several claims relating to a DEA informant's testimony about their participation in an earlier cocaine smuggling scheme; and they ask for a new trial because they say the government withheld exculpatory evidence. We do not believe their arguments are legally sufficient, and we affirm their convictions.

I

Appellants' first claim is that there was insufficient evidence for conviction. A reading of the record, with inferences appropriately drawn in the government's favor, see United States v. Drougas, 748 F.2d 8, 15 (1st Cir. 1984); United States v. Patterson, 644 F.2d 890, 893 (1st Cir. 1981), indicates the following basic series of events:

1. In the morning of August 9, 1985, appellant Michael Lau, president of St. Maartin Helicopter Service, landed his helicopter in St. Croix, Virgin Islands. He falsely told a United States customs officer that he was traveling on to San Juan, Puerto Rico, with only one passenger and that the senior inspector of U.S. customs in St. Croix had said it was all right to "pre-clear" the flight, that is, to grant U.S. customs clearance in St. Croix instead of San Juan. The customs officer then pre-cleared Lau without inspecting the helicopter. (Tr. 259, 262-63, 266-68)

2. Later that day, Lau landed his helicopter in San Juan. Lau, an elderly man, and another man in a wheelchair all got off the helicopter. (Tr. 196) Lau and the elderly man unloaded several suitcases from the helicopter and "left them between two vehicles." (Tr. 336-37) The elderly man and the man in the wheelchair then approached appellant Taylor, a partner in Lau's helicopter company, who was standing nearby awaiting the helicopter's landing. (Tr. 339)

3. Gus Maestrales, a charter jet pilot whom Lau had hired to fly his passengers from San Juan to Orlando, asked Taylor, the elderly man, and the man in the wheelchair if they had any luggage except the few bags they were carrying. They said, "[N]o, we've got more bags over there," and pointed to six suitcases "over by a vehicle." Maestrales' co-pilot complained that the six suitcases "weigh[ed] a ton." (Tr. 194-96)

4. Maestrales, who was perhaps especially cautious because authorities had found $5 million aboard his jet the previous March (Tr. 216-17), thought the bags were suspiciously heavy and asked about their contents. Taylor said, "We don't have anything in there." (Tr. 198) Later, when Maestrales insisted on being shown the contents of the bags, Taylor said they belonged to a man who had not come on the helicopter. He added, "[T]hey are not mine. We don't want you to take them, just leave the bags." (Tr. 202) Maestrales found a customs official, who watched as Maestrales opened one of the bags. Inside was cocaine. (Tr.

203-5) In all, the six suitcases held 193 pounds of cocaine. (Tr. 322)

5. By the time the cocaine was discovered, however, Taylor and the man in the wheelchair had disappeared. (Tr. 277, 416) Two witnesses said they saw Taylor pushing the man in the wheelchair quickly toward the street. (Tr. 341, 354) One of them found the wheelchair abandoned under an airport stairway. (Tr. 342) Another witness, who refueled Lau's helicopter after the bags were unloaded, testified that Lau appeared nervous and in a hurry; his hands were shaking, and "[h]e was dying for the plane to be serviced." As soon as customs cleared Lau to take off, he left. (Tr. 386-88)

The case essentially turned on whether the jury believed that Lau and Taylor knew about the cocaine in the six suitcases or whether its presence there was an unfortunate coincidence. The jury apparently concluded that the presence of the suitcases was no coincidence. We think the facts outlined above -- even without the prior

acts testimony we discuss below -- are more than "sufficient to allow a reasonable juror to find guilt beyond a reasonable doubt." United States v. Guerrero-Guerrero, 776 F.2d 1071, 1073 (1st Cir. 1985) (noting that our system looks to jurors "to come up with answers that reflect the common-sense view of the community"), cert. denied sub nom. Mosquera v. United States, 106 S.Ct. 1233 (1986).

II

The major issues on appeal concern an additional piece of evidence. The government presented the testimony of Thomas Aiello, who said that about two and one-half years before the events described above, in January 1983, he had worked with appellants in a cocaine smuggling venture. Aiello said that he and Taylor and others had met a plane that Lau had flown into Broxton, Georgia. He helped unload from the plane a number of boxes that proved to contain 50 to 60 "football shapes" of cocaine. (Tr. 502-05, 508-10)

Appellants make three separate claims in relation to this evidence. First, they say that Federal Rules of Evidence 404(b) bars this evidence of a prior bad act because it is relevant only to show appellants' bad character. Second, they say the trial judge should have excluded the evidence because the government offered insufficient proof that appellants were the men Aiello saw in Georgia. Third, they say they had insufficient notice of Aiello's testimony. We consider each claim in turn.

A

Since Aiello's testimony amounts to evidence of a prior bad act, it "is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b). The trial court must consider whether the evidence has any "special" purpose other than to show the

defendant's bad character or his propensity to commit the crime. Then it must weigh any such probative value against the prejudicial risk that the jury will convict the defendant simply in order to punish him for his past crime or will assume that a past criminal is a bad person likely to strike again. See United States v. Moccia, 681 F.2d 61, 63 (1st Cir. 1982). The law commits this balancing process in the first instance to the trial court, which is more directly familiar than a court of appeals with the need for the evidence and its likely effect on the jury. See United States v. Rivera Rodriguez, 808 F.2d 886, 888 (1st Cir. 1986); United States v. Fosher, 568 F.2d 207, 212-13 (1st Cir. 1978).

Appellants say that the Broxton incident's probative value depended upon an impermissible inference, namely that, because appellants smuggled drugs before, they would likely do so again. In our view, however, the jury might have made use of the evidence without drawing this inference. For one thing, the jury had to decide

which of three persons aboard the helicopter (Lau, the old man, and/or the man in the wheelchair) likely smuggled the cocaine. The jury might have noted similarities between the August 9 incident and the Broxton incident. These included (1) the presence of a large amount of cocaine; (2) Lau's acting as pilot; and (3) Taylor's being present to receive the cocaine. In addition, although there is no evidence in the transcript about the shape of the cocaine packets seized in San Juan, samples of those packets were before the jury, and the prosecutor implied in closing argument that they, like the packets Aiello saw in Georgia, were football shaped. (Tr. 633) These similarities might have helped the jury to infer that the persons who smuggled cocaine into San Juan were the same as those who smuggled cocaine into Broxton.

For another thing (and more importantly), the the jury had to conclude that Lau and Taylor were not the innocent dupes of a calculating smuggler who hired them, without their knowledge, to ferry him and his drug shipment into the States and who

then, somehow, convinced Lau to lie to a St. Croix customs officer. The fact that Lau and Taylor were knowledgeable about cocaine, that they probably knew first hand what it weighed and had some sense of how it was smuggled, suggests that Lau (like Maestrales) might have become suspicious (if he in fact were innocent) after he was asked to take several heavy suitcases on his helicopter and to make false statements to the St. Croix customs officer. A "knowledgeable" Lau's apparent lack of suspicion makes an innocent explanation of his actions (and hence of his partner Taylor's actions) less plausible. Similarly, Lau's and Taylor's prior contact with cocaine suggests that they knew hat Maestrales was concerned about from the time he first voiced his suspicions; and this fact, in turn, makes a totally naive explanation of Lau's and Taylor's subsequent actions less plausible. To refute such innocent or naive explanations of the appellants' behavior does not automatically prove appellants' guilt, but it

helps draw tighter the circumstantial net convicting them.

We need not decide whether either of these two sets of inferences, standing alone, would justify the admission of this prior bad act evidence. Cf. United States v. Pisari, 636 F.2d 855, 858-59 (1st Cir. 1981) (holding that evidence of prior bad acts, if admitted solely to prove identity, must show "distinctive" similarities with the offense at bar). Together, however, we believe they have sufficient probative value to bring the probity-versus-prejudice balance within the scope of the district court's lawful powers.

B

Appellants argue that the trial judge should have excluded evidence of the Broxton incident for a different reason, namely that the government did not adequately show that they were participants in the earlier smuggling event. Of course, if Aiello misidentified Lau and Taylor, then his evidence has no probative value at all.

Before admitting Aiello's testimony, the district court held a hearing focusing upon identification outside of the jury's presence. The appellants raised the question of identification again before the jury. After reviewing the transcripts of both proceedings, we believe that the identification, legally speaking, was sufficiently certain to support admission of the evidence.

Several factors weigh in favor of a correct identification. First, Aiello twice confidently identified Lau and Taylor in open court, both before the judge and before the jury. (Tr. 444, 501, 505) Second, Aiello had adequate opportunity to observe Lau and Taylor at the time of the Broxton incident. Before the plane landed at Broxton, he had met Lau (to give him a check), and he had gone with Taylor to inspect the landing strip. After the plane landed, he was with them for several hours. (Tr. 500-07) Cf. Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (holding identification reliable where witness had two to

three minutes to observe defendant); Simmons v. United States, 390 U.S. 377, 385 (1968) (five minutes); Judd v. Vose, 813 F.2d 494, 499 (1st Cir. 1987) (three to five minutes); United States v. Eatherton, 519 F.2d 603, 609 (1st Cir.) (one minute), cert. denied, 423 U.S. 987 (1975). Third, some corroboration exists in the facts that Lau has a licence to fly the type of plane used at Broxton (Tr. 583), that Taylor was nearby in Alabama at the time (Tr. 602, 607), and that Aiello consistently used the appellants' correct first names from the time that he first described the Broxton incident to drug enforcement agents. (Tr. 468)

Several other factors, however, weigh against a correct identification. First, Aiello, in statements made soon after Broxton, incorrectly said that Lau and Taylor were about 5'8" and 5'9" tall (in fact they are about 5'11" and 6'4"); and he may have incorrectly said that Lau was clean shaven (he usually wears a beard and mustache). (Tr. 432, 455-56, 515-16, 580) Second,

considerable time elapsed between the Broxton incident and the time that Aiello positively identified photographs of Taylor (more than one year) and Lau (more than two years). (Tr. 471-72, 474) But see United States v. Drougas, 748 F.2d at 28 (five-year lapse between incident and identification does not necessarily render identification unreliable). Third, Aiello saw the defendants in court a few days before he identified them to the judge. (Tr. 456-58)

In addition to these sets of factors (pro an con), Aiello correctly identified defendants from a photo album that a DEA agent showed him sometime before the present time took place (i.e., before August 9, 1985). Several aspects of the photo identification process suggest that these identifications may have been accurate. (Tr. 470-86) For one thing, the DEA agent altogether showed Aiello between 23 and 41 photographs of several different people, some of whom Aiello identified as Broxton participants and others of whom he did not. Moreover, since Aiello picked out the

correct photos before August 9, 1985, the DEA could not have impermissibly encouraged him to identify Lau and Taylor with an eye towards prosecuting the present crime. Further, the DEA placed Lau's and Taylor's photos in the book only after having connected Lau and Taylor with a different person whom Aiello had positively identified from the beginning. (Tr. 469-70) On the other hand, the DEA agent had shown Aiello roughly the same display of photos (except for those of Lau and Taylor) at least once (and perhaps several times) before the agent placed Lau's and Taylor's photos in the book; thus, the other photos among which Lau's and Taylor's appeared were not new to Aiello. Moreover, the DEA agent placed not one but three pictures of Lau in the book at the time that Aiello identified him, thus, at least arguably, further increasing the risk of a false identification.

On balance, we think the pre-August 9 photo identifications sufficient to eliminate any negative implication which appellants might

otherwise draw from Aiello's having seen the defendants in court a few days before he identified them. Apart from that, we do not think it can be used to significantly strengthen the in-court identification; the procedure is too seriously flawed. See Simmons v. United States, 390 U.S. at 383-84 (police should avoid emphasizing picture of suspect in photographic identification); United States v. Eatherton, 519 F.2d at 608 (police should avoid repeatedly showing same picture to witness). But neither was the photo identification procedure so open to DEA "suggestion" as to undercut the reliability of the later in-court identification. After all, Aiello had no problem stating that he did not recognize many of the other persons whose photographs the DEA agent showed him under the same procedure.

Leaving the photo identification to one side, the in-court identification, in our view, is sufficiently reliable (despite the inconsistency about defendants' heights) as to permit the district court to allow the jury to hear Aiello's

testimony. See Simmons v. United States, 390 U.S. at 384 (given opportunity to cross-examine witness, "convictions based on eyewitness identification at trial . . . will be set aside . . . only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification"); Judd v. Vose, 813 F.2d at 498-99; Gullick v. Perrin, 669 F.2d 1, 5-6 (1st Cir. 1981). And, the evidence is sufficiently probative (as set out in Part IIA, supra), that the district court possessed the legal power to admit it. Although the appellants argue that the identification evidence was not "clear and convincing," see United States v. Mascio, 774 F.2d 219, 223 (7th Cir. 1985); United States v. McDaniel, 773 F.2d 242, 247 (8th Cir. 1985), we note that this circuit has not laid down a separate mechanical evidentiary test for "past bad act" identification. Rather, the strength of the evidence linking defendants to a past bad act is but one consideration that the district court must

take into account when weighing its "probative value" against its "prejudicial risk." See United States v. Rivera Rodriguez, 808 F.2d at 888; United States v. Moccia, 681 F.2d at 63. Without expressing a view about whether the evidence here is or is not "clear and convincing," we conclude, on balance, that its probative value is sufficient to bring the question of admissibility within the scope of the trial court's lawful decisionmaking authority.

C

Appellants also claim that despite their timely request that the government disclose its intention to offer 404(b) evidence, the government failed to notify them of Aiello's testimony until December 3, 1985, six days before trial, and that even then the government misspelled Aiello's name. On the day of trial, the district court refused appellants' request for a continuance of 30 days or of 7 days in order to respond to the evidence, but it granted a one-day continuance over a long weekend. A court of appeals will not find that

this kind of decision constitutes reversible error unless a defendant can show abuse of discretion resulting in serious prejudice. See United States v. Jimenez-Diaz, 659 F.2d 562, 567 (5th Cir. 181), cert. denied sub nom Salazar v. United States, 456 U.S. 907 (1982). Appellants have failed to identify any evidence that they might have found with a longer continuance, - or to explain satisfactorily how otherwise they were prejudiced. We therefore find no reversible error.

III

Finally, appellants claim that, despite specific requests for exculpatory evidence, including "written or recorded statements" of appellant Taylor, the government failed to turn over tapes of two conversations between Taylor and two government agents made in connection with another investigation. Both conversations -- which occurred in April 1982, before the January 1983 Broxton incident -- concern an airplane that Taylor owned together with his brother and his brother-in-law. Appellants say that in one of

these conversations, Taylor said he suspected that someone was using the plane to transport drugs, that he strongly opposed any drug daling, and that he had told the FBI that the plane had been stolen.

Appellants say that the government's failure to produce these tapes violated the disclosure rule of Brady v. Maryland, 373 U.S. 83 (1963); alternatively, they request a new trial based on the discovery of this new evidence, see Fed. R. Crim. P. 33. To show a Brady violation, however, appellants must demonstrate that the allegedly suppressed evidence was "favorable" to them and "material" to guilt. Brady v. Maryland, 373 U.S. at 87. Similarly, discovery of new evidence merits a new trial only if the evidence is material and might have had some impact on the outcome of the trial. See In re United States, 565 F.2d 173, 176-77 (1st Cir. 1977). We do not think that the tapes in question meet these standards. For one thing, appellants have not explained how they could have admitted the tapes

into evidence. They amount to hearsay in respect to the truth of Taylor's statements. Fed. R. Evid. 801, 802. They could not be offered to impeach, since no trial witness speaks on the tapes. And, they could not be offered to prove Taylor's character, since the rules allow such proof only by reputation or opinion testimony. Fed. R. Evid. 405(a). For another think, and in any event, we do not see how the evidence of Taylor's professed attitude toward drugs in April 1982 (as it appeared on these tapes) could have swayed the jury's determination of events in January 1983, much less August 1985.

For these reasons, the judgment of the district court is

Affirmed.

B.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

Nov. 02, 1987

No. 86-1255
No. 86-2008

UNITED STATES,

Appellee,

v.

MICHAEL ALAN LAU,

Defendant, Appellant.

No. 86-1256
No. 86-2002

UNITED STATES,

Appellee,

v.

BRUCE TAYLOR,

Defendant, Appellant.

Before

CAMPBELL, Chief Judge

COFFIN, BOWNES, BREYER, TORRUELLA and SELYA,
Circuit Judges

and RE,* Judge.

ORDER OF COURT

Entered: October 29, 1987

The panel of judges that rendered the decision in these cases having voted to deny the petitions for rehearing and the suggestions for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that both petitions for rehearing and both suggestions for rehearing en banc be hereby denied.

By the Court:

/S/ Francis P. Scigliano
Clerk

*Chief Judge of the United States Court of International Trade, sitting by designation.

[cc: Messrs. Camper, Taylor and Bazan]

C.

MANDATE

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 86-2008 UNITED STATES,

Appellee,

v.

MICHAEL ALAN LAU,

Defendant, Appellant.

JUDGMENT

Entered: September 15, 1987

This cause coming on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here

ordered adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Francis P. Scigliano

Clerk.

Certified and Issued

as informal mandate under

F.R.A.P. 41 on NOV 9 1987

FRANCIS P. SCIGLIANO
Clerk

By: /S/ Richard W. Gordon
Chief Deputy Clerk

[cc: Messrs. Camper, Bazan and Taylor]

MANDATE

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 86-2002 UNITED STATES,

Appellee,

v.

BRUCE TAYLOR,

Defendant, Appellant.

JUDGMENT

Entered: September 15, 1987

This cause coming on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here

ordered adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Francis P. Scigliano

Clerk.

Certified and Issued

as informal mandate under

F.R.A.P. 41 on NOV 9 1987

FRANCIS P. SCIGLIANO
Clerk

By: /S/ Richard W. Gordon
Chief Deputy Clerk

[cc: Messrs. Camper, Bazan and Taylor]

MANDATE

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 86-1255 UNITED STATES,

Appellee,

v.

MICHAEL ALAN LAU,

Defendant, Appellant.

JUDGMENT

Entered: September 15, 1987

This cause coming on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here

ordered adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Francis P. Scigliano

Clerk.

Certified and Issued

as informal mandate under

F.R.A.P. 41 on NOV 9 1987

FRANCIS P. SCIGLIANO
Clerk

By: /S/ Richard W. Gordon
Chief Deputy Clerk

[cc: Messrs. Camper, Bazan and Taylor]

MANDATE

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 86-1256 UNITED STATES,

Appellee,

v.

BRUCE TAYLOR,

Defendant, Appellant.

JUDGMENT

Entered: September 15, 1987

This cause coming on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Francis P. Scigliano

Clerk.

Certified and Issued

as informal mandate under

F.R.A.P. 41 on NOV 9 1987

FRANCIS P. SCIGLIANO
Clerk

By: /S/ Richard W. Gordon
Chief Deputy Clerk

III. JUDGMENTS SOUGHT TO BE REVIEWED:

A.

UNITED STATES DISTRICT COURT FOR

THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA vs.

DEFENDANT MICHAEL ALAN LAU

Docket No. Cr. 85-321-01 (PG)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date March 07, 1986

X WITH COUNSEL William Camper and Carlos Lopez de Azua

There being a verdict of X GUILTY.

Defendant has been convicted as charged of the offense(s) of conspiracy to possess with intent to distribute cocaine, a Sch. II Narcotic Drug Controlled Substance, in violation of Title 21 USC § 846, 952(a), 841(a)(1) as charged in Count One; aid and

abet to import cocaine, a Sch. Narcotic, in violation of Title 18 USC § 2 and Title 21 USC § 952(a) as charged in Count Two of the indictment; and aid and abet in the possession with intent to distribute cocaine, a Sch. II Narcotic, in violation of Title 18 USC § 2 and Title 21 USC § 841(a) as charged in Count Three of the indictment.

The Court asked whether defendant had anything to say why judgment should not be announced. Because no sufficient cause to the contrary was shown or appeared to the Court the Court adjudged the defendant guilty as charged and convicted and ordered that The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of twenty years (20) in Count One and fined the sum of $20,000; for a period of twenty (20) years in Count Two and fined the sum of $20,000; and for a period of fifteen (15)

years in Count Three and fined the sum of $20,000. Only the imprisonment terms imposed in Counts One and Two are to be served concurrently with each other. The term of imprisonment imposed in Count Three is to be served consecutively to the terms of imprisonment imposed in Counts One and Two.

The defendant is ordered to stand committed until the fines are paid or he is otherwise discharged by due course of law.

Credit towards the sentence is to be given for any time spent in jail in relation to this case.

/S/ Juan M. Perez-Gimenez March 7, 1986

B.

UNITED STATES DISTRICT COURT FOR

THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA vs.

DEFENDANT BRUCE TAYLOR

Docket No. Cr. 85-321-02 (PG)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date March 07, 1986

X WITH COUNSEL Clyde Taylor and Fernando Carlo Gorbea

There being a verdict of X GUILTY. Defendant has been convicted as charged of the offense(s) of conspiracy to possess with intent to distribute cocaine, a Sch. II Narcotic Drug Controlled Substance, in violation of Title 21 USC § 846, 952(a), 841(a)(1) as charged in Count One; aid and abet to import cocaine, a Sch. Narcotic, in

violation of Title 18 USC § 2 and Title 21 USC § 952(a) as charged in Count Two of the indictment; and aid and abet in the possession with intent to distribute cocaine, a Sch. II Narcotic, in violation of Title 18 USC § 2 and Title 21 USC § 841(a) as charged in Count Three of the indictment.

The Court asked whether defendant had anything to say why judgment should not be announced. Because no sufficient cause to the contrary was shown or appeared to the Court the Court adjudged the defendant guilty as charged and convicted and ordered that The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of fifteen years (15) in Count One and fined the sum of $20,000; for a period of fifteen (15) years in Count Two; and for a period of twenty (20) years in Count Three and fined the sum of $20,000. Only the terms of

imprisonment imposed in Counts One and Two are to be served concurrently with each other. The term of imprisonment imposed in Count Three is to be served consecutively to the terms of imprisonment imposed in Counts One and Two.

The defendant is ordered to stand committed until the fines are paid or he is otherwise discharged by due course of law.

Credit towards the sentence is to be given for any time spent in jail in relation to this case.

/S/ Juan M. Perez-Gimenez March 7, 1986

Supreme Court, U.S.
FILED
APR 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 87-1311

In the Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL ALAN LAU AND BRUCE TAYLOR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

7pp

TABLE OF AUTHORITIES

	Page
Statutes and rule:	
18 U.S.C. 2	1
21 U.S.C. 841(a)(1)	1
21 U.S.C. 846	1
21 U.S.C. 952(a)	1
Fed. R. Evid. 404(b)	1, 2, 4

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1311

MICHAEL ALAN LAU AND BRUCE TAYLOR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioners contend that "similar act" evidence is admissible at trial under Fed. R. Evid. 404(b) only when the district court finds that the similar acts have been proved by clear and convincing evidence.

1. Following a jury trial in the United States District Court for the District of Puerto Rico, both petitioners were convicted on one count each of conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846; importation of cocaine, in violation of 21 U.S.C. 952(a) and 18 U.S.C. 2; and possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. Petitioner Lau was sentenced to concurrent terms of 29 years' imprisonment and a $40,000 fine on the conspiracy and importation counts. On the possession count, he was sentenced to a consecutive term of 15 years' imprisonment and a $20,000 fine (Pet. App. 38-39). Petitioner Taylor was sentenced to concurrent

terms of 15 years' imprisonment and a $20,000 fine on the conspiracy and the importation counts, and a consecutive term of ten years' imprisonment and a $20,000 fine on the possession count (*id.* at 41-42). The court of appeals affirmed (*id.* at 5-26).

The evidence at trial showed that on August 9, 1985, petitioner Lau landed a helicopter in San Juan, Puerto Rico, where it was met by Lau's business partner, petitioner Taylor. Lau and a passenger unloaded several suitcases from the helicopter for transfer to an airplane, which was to carry Lau's passengers and the baggage to Florida. The airplane's pilot, however, insisted on seeing the contents of the suitcases; when the pilot opened the suitcases in the presence of a customs inspector, he discovered 193 pounds of cocaine. Pet. App. 8-10.

At trial, the government informed the district court that it intended to offer evidence of petitioners' similar acts under Fed. R. Evid. 404(b). Specifically, the government wanted to introduce testimony by Thomas Aiello that, in January 1983, Aiello had assisted Taylor and others in unloading a number of boxes containing cocaine from an airplane that had been piloted by Lau. Petitioners objected, arguing, among other things, that their participation in the January 1983 drug venture could not be established by clear and convincing evidence (Tr. 430-437).

At a hearing on petitioner's objections, Aiello testified that in January 1983 he assisted a group of drug smugglers in unloading cocaine from an airplane in Broxton, Georgia. He identified Lau as "Mike," the pilot of the airplane, and Taylor as "Bruce," one of the offloaders (Tr. 445). Aiello stated that he first met Taylor at the landing strip about one week before the plane landed (Tr. 444-445), and that he first met Lau in August 1982 at an airport lounge in Atlanta, Georgia (Tr. 446). Aiello indi-

cated that he had an opportunity to observe petitioners for several hours because the plane became stuck in mud. Unable to move the plane, Aiello and petitioners drove to Jacksonville together. Tr. 449-451. In addition, Aiello testified that he was arrested by federal agents in late 1983 (Tr. 446), and that he subsequently selected photographs of each petitioner from an array (Tr. 447-448). Aiello's account was in part corroborated by the testimony of a federal agent (Tr. 469-470, 483). After hearing that evidence, the district court permitted Aiello to testify at trial (Tr. 487-488).

The court of appeals affirmed. In rejecting petitioners' challenge to the admission of the similar act evidence, the court noted that "[s]everal factors weigh in favor of a correct identification" of petitioners by Aiello: "Aiello twice confidently identified Lau and Taylor in open court, both before the judge and before the jury"; "Aiello had adequate opportunity to observe Lau and Taylor at the time of the Broxton incident" (Pet. App. 17); independent corroboration "exist[ed] in the facts that Lau has a license to fly the type of plane used at Broxton (Tr. 583), that Taylor was nearby in Alabama at the time (Tr. 602, 607), and that Aiello consistently used [petitioners'] correct first names from the time that he first described the Broxton incident to drug enforcement agents" (Pet. App. 18). The court also noted that "Aiello correctly identified [petitioners] from a photo album that a DEA agent showed him sometime before the present [cr]ime took place," so that "the DEA could not have impermissibly encouraged him to identify Lau and Taylor with an eye towards prosecuting the present crime" (*id.* at 19-20).[1]

---

[1] The court also noted several considerations that pointed in the other direction: shortly after his arrest, Aiello gave physical descriptions of petitioners that misstated their heights, and he may have

With this as background, the court rejected petitioners' argument that Aiello's testimony should have been excluded because it did not establish their involvement in the Broxton incident by clear and convincing evidence. The court explained that it "has not laid down a separate mechanical evidentiary test for 'past bad act' identification" (Pet. App. 22). But "[w]ithout expressing a view about whether the evidence here is or is not 'clear and convincing,' " the court "conclude[d], on balance, that its probative value is sufficient to bring the question of admissibility within the scope of the trial court's lawful decisionmaking authority" (*id.* at 23).

2. Petitioners contend (Pet. 10-15) that evidence of "similar acts" is admissible under Fed. R. Evid. 404(b) only when the district court is satisfied by clear and convincing evidence that the defendant committed those acts. As petitioners correctly note, the circuits are in disarray on this issue: several have adopted petitioners' standard, while others have held "similar act" evidence admissible under a less exacting test. See U.S. Brief at 13-14 n.3 (citing cases) in *Huddleston* v. *United States*, No. 87-6.[2] The propriety of the clear and convincing standard currently is before the Court in *Huddleston*. Because the court below expressly declined to determine whether the evidence here satisfies that standard, this case should be held pending the Court's decision in *Huddleston* and disposed of in light of that decision.

---

incorrectly stated that Lau was clean shaven (Pet. App. 18). In addition, the court concluded that there were some suggestive elements to the photo array (*id.* at 20).

[2] We are furnishing a copy of our brief in *Huddleston* to counsel for the petitioners here.

Respectfully submitted.

CHARLES FRIED
Solicitor General

APRIL 1988

☆ U.S. GOVERNMENT PRINTING OFFICE 1988—202 037/60373

Supreme Court, U.S.
FILED
APR 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1311

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

MICHAEL ALAN LAU and
BRUCE TAYLOR,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITIONER'S REPLY BRIEF TO "MEMORANDUM FOR THE UNITED STATES"

ROBERT AUGUSTUS HARPER
131 North Gadsden Street
Post Office Box 10132
Tallahassee, FL 32302-0132
(904) 224-5900

Counsel for Petitioners

1. TABLE OF CONTENTS AND CITATIONS

Page

a. Table of Contents

Statement of the Issues 1

Argument and Citations of Authority 2

Certificate of Service 7

b. Table of Citations

Hammar v. United States, 27 U.S. 620, 46 S.Ct. 603, 70 L.Ed 1118 (1926) 6

Weiler v. United States, 323 U.S. 606, 65 S.Ct. 548, 89 L.Ed. 495 (1945) 6

Rule 404(b), Fed. R. Evid. 1, 6

2. STATEMENT OF THE ISSUES

Whether the standard of proof predicate for the admission of similar fact evidence under Rule 404(b), Fed. R. Evid., is "clear and convincing" or some other standard, a question over which the circuits are divided.

3. ARGUMENT AND CITATIONS OF AUTHORITY

In reply to the "Memorandum for the United States," filed on the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit, Petitioners wish to bring to the Court's attention several responses to various allegations made by the Government.

The evidence at trial of the Petitioners was circumstantial. It was a very close case. The admission of the similar fact evidence was the critical balance in favor of the prosecution. Most cases involving similar fact evidence are of this narrow range. Where there is overwhelming evidence of guilt, the necessity for similar fact evidence diminishes or becomes unnecessary. It is important therefore that the Supreme Court of the United States establish standards governing the admission of these types of offenses or facts.

In the case below informant Aiello was subjected to some questionable showup procedures. While he testified as having met a "Mike" and a "Bruce," Aiello also had to be subjected to

suggestive courtroom showups in order to confirm his identification. He then testified about a series of facts which easily could have been a fabrication.

A standard of proof will provide a safeguard against fabricated testimony in future prosecution. It is very difficult to prosecute a "successful" criminal episode, i.e. one which achieves its objective. It is very difficult for the prosecution to prove the undetected crime occurred. It is admittedly difficult for the prosecution to prove a successful importation, off-loading, distribution operation unless someone is arrested. But this difficulty does not dissipate the need for corroboration to establish that a crime in fact occurred. It should be independently proven that the "similar fact" occurred and is not the figment of the vivid imagination of an informant seeking to gain favors from the arresting or prosecuting authorities.

There was no corroboration of Aiello below. No level of proof was satisfied that the Broxton,

Georgia, incident occurred in the first instance. The Government never corroborated the flight record that Aiello flew from Miami to Atlanta to have a meeting as he testified. The Government offered no confirming proof of any check that Mr. Aiello allegedly gave Petitioner LAU. The Government offered no telephone records to verify that Mr. Aiello ever called either of the Petitioners as he testified. The Government offered no photographs, maps or plats to prove that an airstrip actually existed in the area Mr. Aiello identified. The Government offered no independent proof that the airplane of the description given by Mr. Aiello ever existed, and no proof of a plane crash in the area Aiello described. The Government volunteers that Aiello's testimony "was in part corroborated by the testimony of a federal agent" (TR469-470, 483), but an examination of the cited record does not substantiate the testimony of Aiello. (The agent merely testified to the organization of the photo array, which does not support Aiello.)

The very fact there was no corroboration of any of the events surrounding Aiello's prior incident testimony, is the reason that a standard of proof is required. Nowhere is a safeguard more important than with the uncorroborated testimony of an alleged co-conspirator who has much to gain by pleasing the authorities with his testimony and little to lose by antagonizing the constitutional rights of his former associates. The integrity of the criminal justice system must be protected. A standard of proof needs to be established in order to give at least initial authenticity to the proffered evidence.

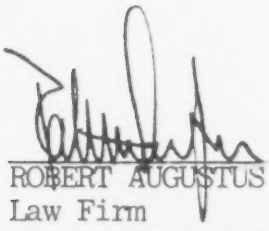
It has been presented that the appropriate standard of proof be "clear and convincing" evidence. Rather than this case being disposed in light of Huddleston, 87-6, as the Government invites, Petitioners wish to join issue on the merits and present argument that the pervasive ramifications of a standard will protect the innocent, correct injustices, and avoid

miscarriage without any attendant sacrifice of viable prosecutions. A procedural safeguard is necessary just as the "two witness" perjury rule, Hammar v. United States, 27 U.S. 620, 46 S.Ct. 603, 70 L.Ed 1118 (1926), is necessary. A check and balance is appropriate under Rule 404(b), Fed. R. Evid., just as "corroborating circumstances" replace one of the two required witnesses in a perjury prosecution. Weiler v. United States, 323 U.S. 606, 65 S.Ct. 548, 89 L.Ed. 495 (1945).

4. CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been furnished to Charles Fried, Esq., Solicitor General, Department of Justice, Washington, D.C. 20530, by U. S. Mail this 22nd day of April, 1988.

Respectfully submitted,



ROBERT AUGUSTUS HARPER
Law Firm
131 North Gadsden Street
Post Office Box 10132
Tallahassee, FL 32302-0132
(904) 224-5900

Counsel for Petitioners

RAHpp2c